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IN THE

Supreme Court of the United States

October Term, 1965

No. 1080

BENRUS WATCH COMPANY, INC., a Corporation, BELFORTE WATCH COMPANY, INC., a Corporation, and OSCAR M. LAZRUS, Individually and as an Officer of Aforesaid Corporations, and HARVEY M. BOND, STANLEY M. KARP, SAMUEL M. FELDBERG, JAY K. LAZRUS, ROBERT WEIL, MARTIN J. RASNOW, LEO HYMAN and JULIAN LAZRUS, Individually as Officers of BENRUS WATCH COMPANY, INC.,

Petitioners,

against

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioners,

against

FEDERAL TRADE COMMISSION

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on December 2, 1965, affirming and enforcing a final cease and desist order issued by the Federal Trade Commission on February 28, 1964.

Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit, printed in Appendix A, *infra*, p. 15, is reported at 352 F. 2d 313. The opinion of the Federal Trade Commission is printed in Appendix C, *infra*, p. 36.

Jurisdiction

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on December 2, 1965 (Appendix B, *infra*, p. 35). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Where no evidence is offered to support the complaint of the Federal Trade Commission that by engaging in the practice of attaching price tickets to its watches and advertising those prices, petitioners, leading watch manufacturers and their officers, misrepresented that such preticketed prices were the "usual and regular retail prices" (which term the Commission, in construing the complaint, interpreted to mean the generally prevailing prices for the watches) and where all of the evidence of record is to the contrary, may the Commission nevertheless sustain the charges of the complaint by sole reliance on its *a priori* conclusion that the preticketing practice is so construed by consumers—particularly when the Commission, by enactment prior to entry of its final order of its new Guides against Deceptive Pricing, expressly repudiates its view that the practice is so construed?

2. In view of the promulgation of the new Guides against Deceptive Pricing, radically altering the rule of law applied by the Commission in deciding this case, should not petitioners have been afforded an opportunity to demonstrate that their conduct was lawful when measured by the new standard?

3. May the Commission predicate an order with respect to petitioners' guarantee advertising practices on evidence of practices abandoned by petitioners prior to the commencement of the Commission proceeding and as to which, in any event, no evidence was offered to demonstrate that they were deceptive?

4. May the Commission issue an order based on a finding that the bezels of petitioners' watches (the grooved rims or flanges in which watch crystals are set) contained less than the minimum amount of gold electroplate prescribed by the Commission's Trade Practice Rules for the Watchcase Industry when the complaint, rather than charging such a violation, charged only that petitioners' watch cases contained no gold electroplate whatever and had been treated to simulate precious metal and when all of petitioners' watches did, in fact, contain substantial quantities of gold electroplate?

Statutes Involved

The statutory provision involved is Section 5(a)(1) of the Federal Trade Commission Act, 15 U. S. C. Section 45(a)(1). It is printed in Appendix D, *infra*, p. 53.

Statement

Petitioners, leading watch manufacturers and their officers, were charged in a complaint issued by the Federal Trade Commission (1 R. 1-7) * with engaging in certain unfair and deceptive acts and practices, in violation of Section 5(a)(1) of the Federal Trade Commission Act (Appendix D, *infra*, p. 53).

The complaint alleged, *inter alia*, that petitioners, by engaging in the practice of attaching tickets to their products containing retail prices and of disseminating price lists, catalogs, brochures and other forms of advertising containing those prices, misrepresented that such preticketed prices were the "usual and regular retail prices" of those products (1 R. 2-3); and that petitioners' trade-in

* References designated "1 R. ", "2 R. ", etc., refer to the four volumes of the Certified Transcript of Record filed with the Clerk.

and allowance certificate practices, because they were based on this so-called preticketing practice, were likewise deceptive (1 R. 3). The complaint also charged that in their advertising of guarantees, petitioners failed clearly and conspicuously to disclose the terms of guarantee (1 R. 4), and that they deceptively sold watches enclosed in cases whose bezels had been treated or processed to simulate or have the appearance of gold or gold alloy, which cases had not been marked to disclose clearly that the bezels were composed of base metal (1 R. 4).

With respect to the charges as to the preticketing practice (and the related trade-in and allowance certificate practices), the Commission offered no evidence whatever concerning actual consumer understanding of the practice. It offered evidence merely of sales made both below the preticketed prices (see, e.g., 1 R. 144, 146, 147, 151, 152, 166, 170, 172, 177) and at the preticketed prices (1 R. 150, 151, 158, 241-242, 244; 2 R. 34-36).

At the conclusion of the Commission's case, petitioners moved to dismiss the complaint in these respects on the ground that the term "usual and regular retail prices," as used in the complaint, meant only that substantial sales were made at those prices, and that since the Commission's own evidence demonstrated that in fact such substantial sales were made, the charges had not been sustained (1 R. 12-21). The Hearing Examiner, however, denied the motion to dismiss, applying the then Commission rule that the phrase "usual and regular retail prices" was to be read as meaning the prices generally prevailing in the trade area (1 R. 25-25d). Since the preticketed prices were not the "usual and regular retail prices," as so construed, the Hearing Examiner refused to dismiss the charges relating to the preticketing practice.

In presenting their case, petitioners, confronted with the then Commission view as to the phrase, did not attempt to demonstrate that the preticketed prices were the "usual and regular retail prices," as construed by the Examiner, but, instead, offered evidence demonstrating that the preticketing practice was *not* in fact construed by consumers as embodying such a representation—that is, a representation that the prices preticketed were generally prevailing prices, prices charged without substantial deviation (1 R. 342-343; 2 R. 51-70).

In his subsequent Initial Decision, rendered at the close of the hearings, the Hearing Examiner adhered to the view he had previously expressed as to the construction of the term "usual and regular retail prices" and, notwithstanding the failure of Commission counsel to offer evidence supporting such a construction, sustained the charges in the complaint in these respects (1 R. 74-77).

On review, the Commission affirmed the decision of the Hearing Examiner, likewise reading the phrase "usual and regular retail prices," as used in the complaint, to mean the generally prevailing prices in the trade area (1 R. 112, 113-119). Doing so, the Commission rejected the evidence offered by petitioners that if this were the representation with which they were charged, they had not in fact made such a representation because consumers did not so construe preticketed prices. The Commission's conclusion thus was an *a priori* conclusion, not based at all upon any evidence of record (1 R. 117).

Prior to the entry of its final order in this case (on February 28, 1964 (1 R. 132)), however, the Commission, on January 8, 1964, had promulgated new Guides against Deceptive Pricing, in which it itself had repudiated the prior Commission view concerning the effect of the preticketing practice on consumers and the meaning to be ascribed to the term "usual and regular retail prices" (Fed-

eral Trade Commission, Guides against Deceptive Pricing, 2 CCH Trade Reg. Rep. ¶ 7897).

The Commission now stated, in the new Guides, that the preticketing practice is understood by consumers only as a representation that the prices preticketed are the prices

> "at which substantial (that is, not isolated or insignificant) sales are made in the advertiser's trade area (the area in which he does business)" (*Id.*, Guide III)

The Commission further emphasized that nationwide concerns "cannot be required to police or investigate in detail the prevailing prices of . . . [their] articles throughout so large a trade area" and that the preticketing practice will not be deemed deceptive if a seller "advertises or disseminates a list or preticketed price in good faith (i.e., as an honest estimate of the actual retail price) which does not appreciably exceed the highest price at which substantial sales are made in his trade area . . ." (*Ibid.*)

With respect to deceptive guarantee advertising, the Commission, reversing the Hearing Examiner's decision dismissing this charge in the complaint (1 R. 79-82), sustained the complaint, based on evidence relating to practices which petitioners had abandoned prior to the commencement of the Commission proceeding and which the Examiner held (1 R. 82) had not, in any event, been deceptive (1 R. 119-120).

With respect to the charge as to the misleading marking of metallic composition of the watchcase bezels, the Commission again reversed the Examiner's dismissal of the charge (1 R. 84-85), predicating its order sustaining the complaint in this respect upon a finding that petitioners' watches did not contain the minimum plating required by the Commission's Trade Practice Rules for the Watchcase Industry (1 R. 122-125), a charge not contained in the complaint.

On review, the Court of Appeals affirmed the cease and desist order of the Commission in all respects (4 R. 24-25; Appendix B, *infra,* p. 35). As to the charges relating to the preticketing practice, the Court rejected petitioners' contention that there was no evidence that that practice was construed by consumers as representing the preticketed prices to be those generally prevailing, as charged in the complaint, but held that "[w]hat impression is made by a given practice is a question of fact for the Commission to determine, and the Commission's determination that a practice is deceptive should not be disturbed by the courts unless arbitrary or clearly wrong" (Appendix A, *infra,* pp. 20-21). With respect to petitioners' alternative contention that the adoption of the new Guides requires remand for consideration of the case in the light of those Guides, the Court of Appeals, although noting that "it would not have been improper, of course, for the Commission to have reviewed the record in the light of the new guides . . .", held that the Commission was not required to do so (*Id.,* p. 24).

Addressing itself to the charge relating to petitioners' guarantee advertising, the Court below, although stating that "we may entertain some doubt as to whether the matter complained of had any real tendency seriously to receive anyone" (*Id.,* p. 27), affirmed the Commission's finding that the practices in which petitioners had been engaged prior to the commencement of the Commission's proceeding were deceptive. The Court of Appeals affirmed the Commission's order despite the abandonment of the practices upon which the order was based even though the Court concluded "that the Commission might well have upheld the Examiner in dismissing the charge relating to the guarantees" (*Id.,* p. 28).

In affirming the Commission's order with respect to petitioners' practices as to the metallic composition marking of its watchcases, the Court held that although the charge sustained may not have been made in so many

words in the complaint, the Commission was justified, in view of exchanges between counsel during the course of the proceeding, in holding that petitioners knew "that the Commission was complaining of the low gold content of the bezels rather than urging that the bezels contained no gold or gold alloy" (*Id.*, p. 31). In this regard, the Court also adverted to the subsequent order of the Commission, entered on the petition to reopen the proceeding, directing its Bureau of Industry Guidance to institute a proceeding to determine whether the Trade Practice Rule in question should be revised (*Id.*, pp. 31-32).

Reasons for Granting the Writ

1. The Charges as to the Preticketing Practice

We are mindful that an administrative agency is deemed to have expertise which may be called upon in the resolution of particular controversies. We submit, however, that when, as here, the evidence of record demonstrates that the general proposition of fact upon which the Commission relies for its judgment is simply not true, it is improper for the Commission to rest its decision on such an *a priori* assumption. Here, this conclusion is reinforced by the fact that the Commission had itself repudiated this view prior to the entry of the final order in the proceeding.

Thus, an important question of judicial control over administrative agency procedures is presented. May an administrative agency ignore the evidence of record and, notwithstanding such evidence, find a violation of law based upon a conclusion without evidentiary support in the record? We contend that sound practice forbids such a result. As stated in *Capital Transit Co.* v. *Public Utilities Commission,* 213 F. 2d 176, 187 (D. C. Cir. 1953), cert. den. 348 U. S. 816 (1954):

> ". . . The 'expertise' of a commission usefully serves it in evaluating the evidence, but that expertise cannot supply evidence and cannot without

> findings made upon the critical issues before it, guide a commission to a rational and lawful decision."

Cf. *Automatic Canteen Co.* v. *F. T. C.*, 346 U. S. 61, 81; *Glendenning* v. *Ribicoff*, 213 F. Supp. 301, 303 (W. D. Mo.).

The impropriety of administrative agency reliance on expertise alone in the absence of supporting evidence in the record and in the face of substantial evidence to the contrary is confirmed by the considerations underlying Section 7(d) of the Administrative Procedure Act, which reads, as follows:

> "Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary" (5 U. S. C. 1006(d)).

As we have indicated, the Commission construed the complaint in the present case to charge that petitioners represented that the preticketed prices on their watches were the generally prevailing prices in the trade area, that is, the prices at which the watches were sold without substantial deviation. There was, however, no evidence of record that petitioners in fact had so represented. And to the contrary, petitioners had put in reliable evidence, credited by the Hearing Examiner, demonstrating that the preticketing practice was not so construed by consumers. Nevertheless, the Commission found that it was.

After its decision but before the entry of its final order, the Commission itself repudiated its earlier view. The Commission held and it now holds, as its new Guides against Deceptive Pricing (2 CCH Trade Reg. Rep. ¶7897) announce, that the preticketing practice is construed by consumers only as a representation that the prices pre-

ticketed are those "at which substantial (that is not isolated or insignificant) sales are made in the advertiser's trade area (the area in which he does business)" (*Id.*, Guide III).

If this is the manner in which consumers construe the preticketing practice, there is no basis whatever for the Commission's conclusion that consumers construed petitioners' preticketed prices in a different fashion—that is, as a representation that such prices were the generally prevailing retail prices. It it no answer to suggest that the record in this case indicated that substantial sales were not made at the preticketed prices, so that the charge in the complaint might be sustained even under the Commission's revised standards. The record before the Commission in this regard was only Commission counsel's case. Petitioners put in no evidence at all of actual sales made. When petitioners were confronted with the Hearing Examiner's decision, on their motion to dismiss, construing this charge in the complaint as a charge that they had represented that the prices preticketed were the generally prevailing prices, they proceeded to demonstrate that they had not so represented and they did not offer evidence as to sales at the preticketed prices. It would be quite another matter had the complaint been read in accordance with the new Guides and petitioners been afforded an opportunity to demonstrate that substantial sales were, in fact, made at the preticketed prices, and that those prices thus were the "usual and regular retail prices", as read in light of the new Guides.

Thus, at the least, this case should have been remanded by the Court below to the Commission, so that petitioners might be afforded an opportunity to demonstrate that their conduct conformed with the revised standards of the new Guides. The Court below recognized this, stating: "It would not have been improper, of course, for the Commission to have reviewed the record in the light of the

new guides before issuing its final order . . .'' (Appendix A, p. 24). But the Court nevertheless erroneously concluded that ''we do not feel it was its mandatory duty to do so, or that it abused its discretion when it did not do so'' (*Ibid.*).

The invalidity of the judgment below is demonstrated by the Commission's own ruling in *Majestic Electric Supply Co., Inc.*, FTC Docket No. 8449. In that case, the Commission reversed a hearing examiner's finding of deceptive preticketing practices because it recognized that his finding had been based on evidence responsive to the former Commission's view rather than the standards of the new Guides. The Commission stated (see Appendix A, pp. 24-25):

> ''The evidence in this case establishes that some of the articles listed in respondents' catalog were not usually and regularly sold in certain communities in which the catalog was disseminated at the represented higher 'Retail' prices. But no showing was made, and in view of the allegations of the complaint, no attempt was made to show, that the so-called 'Retail' prices were appreciably in excess of the highest price at which substantial sales of the merchandise were being made throughout the area in which respondents' catalog was circulated. Consequently, the record does not support a finding that respondents' claims as to the 'Retail' prices of their merchandise were deceptive under the new pricing guides. That part of the complaint challenging respondents' use of such claims will be dismissed.''

The Commission's order in the present case was therefore quite improper, and the judgment below affirming the order is clearly in error. Whether the Commission was authorized to subject petitioners to a cease and desist order in the face of substantial contrary evidence of record and its own present contrary view as to the construction placed by consumers on preticketed prices presents an important question concerning the proper functioning of administrative agencies.

2. The Charge as to the Guarantee Advertising Practice.

The order of the Commission with respect to the charge on guarantee advertising is based solely upon practices abandoned by petitioners before the Commission proceeding was commenced. The Court below, referring to the abandoned practices relied on by the Commission, said, ". . . we may entertain some doubt as to whether the matter complained of had any real tendency seriously to deceive anyone" (Appendix A, p. 27). And it noted that "the Commission did not quarrel with the finding of the Examiner that the original deceptive practices relative to guarantee had been abandoned, and we think that the Commission might well have upheld the Examiner in dismissing the charge relating to the guarantees" (*Id.*, p. 28). Nevertheless, the Court affirmed the order.

In such circumstances, where practices have been abandoned, there is no warrant whatever for the issuance of an order by the Commission and its affirmance by the courts. The judgment below sanctions a wholly unjustified exercise of power by an administrative agency.

3. The Charge as to the Marking of Watchcases to Disclose the Metallic Composition of Bezels.

The Commission's procedures with respect to the charges concerning the metallic composition marking of watchcases manufactured and sold by petitioners was completely contrary to fundamental standards of fairness.

The Commission's complaint charged only that the bezels of petitioners' watchcases contained no gold or gold alloy and that the failure to mark the watchcases to disclose the base metal content of the bezels was deceptive (1 R. 4). The Hearing Examiner so construed the charge and, finding it unsupported, directed dismissal (1 R. 84-85). In reversing the Hearing Examiner, the Commissioner ignored the plain language of its own complaint and found petitioners in violation of a charge not there asserted.

That the Commission completely misread the complaint and found a violation not charged is evidenced by a comparison of the order entered in the proceeding and the language of the complaint itself. Paragraph 4 of the order is in the same terms as paragraph 10 of the complaint, referring to cases "which are in whole or in part composed of base metal which has been treated to simulate precious metal" (1 R. 4, 134-135). It is this language in the complaint which the Commission construed to include the sale of watches which do contain gold electroplating but to a thickness less than that provided by the Trade Practice Rules. However, the Commission, in paragraph 5 of its order, goes on specifically to proscribe the sale of watches,

> "the cases of which are in whole or in part composed of base metal which has been treated with an electrolytically applied flash or coating of precious metal of less than 1½/1000 of an inch . . ." (1 R. 134).

Thus, the Commission itself did not construe the "composed of base metal" language (of paragraph 4 of the order and paragraph 10 of the complaint) to include watchcases which contain gold electroplate but of a thickness less than that prescribed by the Trade Practice Rules.

The entry of an order by the Commission based on its finding of conduct as to which petitioners were never charged and consequently had no notice is plainly an unfair and improper exercise of administrative authority, and the judgment below sanctions such an unfair procedure. In the light of so far a departure from the accepted and usual course of sound administrative procedures, this Court should exercise its power of supervision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE COURT OF APPEALS
[November 4, 1965.]

Before VAN OOSTERHOUT and RIDGE, Circuit Judges, and HENLEY, District Judge.

HENLEY, *District Judge.*

These are petitions for judicial review of a final order of the Federal Trade Commission, issued on February 28, 1964, commanding petitioners to cease and desist from certain trade practices found by the Commission to violate section 5(a)(1) of the Federal Trade Commission Act, 15 U. S. C. A., § 45(a)(1). The basis for such review is 45 U. S. C. A., § 43(c).[1]

The principal petitioners are Benrus Watch Company, Inc., and its wholly owned subsidiary, Belforte Watch Company, Inc. The individual petitioners are officers or former officers of the corporate petitioners. Throughout most of this opinion the individual petitioners will be ignored, and the corporate petitioners will be referred to collectively as Benrus.

Benrus is a New York corporation having its principal place of business in New York City. It manufactures and sells in interstate commerce men's and women's watches. There is no question that Benrus is subject to the jurisdiction of the Commission.

Benrus watches in general are sold to retail outlets and to mail order and catalog houses, which in turn sell the watches to consumers for cash or on credit. The Commission's complaint against Benrus was issued in January 1959, and the period covered by the evidence extended

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[1] The petition in No. 17,692 was filed directly in this Court. The petition in No. 17,821 was subsequently filed in the Court of Appeals for the District of Columbia and was transferred here under the provisions of 28 U. S. C. A., § 2112(a). The two petitions have been heard together.

from 1955 onward. The complaint preferred eight charges of unfair and deceptive practices, which charges Benrus denied, although, as will be seen, Benrus admitted many of the underlying facts set forth in the complaint.

In an initial decision rendered on May 24, 1962, the Hearing Examiner in charge of the case found that Benrus had been guilty of illegal practices in two of the respects charged and recommended the issuance of a cease and desist order with respect to those practices. Other charges were dismissed.

Both sides sought and received review by the Commission. On July 31, 1963, the Commission filed an opinion in which it was found that the Examiner should be sustained to the extent that he had determined that Benrus was guilty of unlawful practices. The Commission further found, however, that other charges contained in the complaint had been established notwithstanding the contrary conclusion of the Examiner.

Contemporaneously with the filing of its opinion just mentioned, the Commission promulgated a proposed order substantially broader than that recommended by the Examiner. On September 11, 1963, petitioners objected to the proposed order; counsel supporting the complaint replied to the objections; and the Commission determined that the objections should be overruled. As indicated, the final order of the Commission was filed on February 28, 1964. The restraints contained in the final order are those set forth in the proposed order of July 31, 1963.

In the instant petitions it is claimed that the Commission's findings of violations of section 5(a)(1) of the Act are not sustained by substantial evidence, that in certain respects the order of the Commission is too broad, and that even if the Commission is not reversed outright, the cause should be remanded to the agency for further proceedings. The Commission contends that its order was properly issued, and that the case should not be remanded.

Appendix A

In substance, the complaint issued by the Commission charged Benrus with unfair and deceptive practices in connection with its "preticketing" of its merchandise with purported retail prices and in connection with activities and practices related to such preticketing, with unfair and deceptive practices in connection with Benrus guarantees of watches including the advertising of such guarantees, in connection with the description of Benrus watches as being "shock-proof" or "shock-protected," and in connection with the markings or absence of markings of its watches in relation to the composition of the bezels of the watches.[2]

The Commission found Benrus guilty of unfair and deceptive practices in the areas just mentioned and ordered Benrus to cease and desist from such practices. An original charge that Benrus had falsely advertised that certain low-priced watches were available to Benrus outlets, and another charge relating to the composition of the bezels were dismissed by both the Examiner and the Commission.

The principles governing our review of the challenged order are well established. We do not try the case de novo. It is for the Commission, rather than the courts, to weigh the evidence, appraise the credibility of witnesses, resolve conflicts in testimony, and draw legitimate inferences from the testimony and from the underlying facts proved by the evidence. If the Commission's factual findings are supported by substantial evidence, they are conclusive and binding upon us. But, Commission findings or rulings which are not supported by substantial evidence, or which are arbitrary or capricious, or which proceed from an erroneous view of the law cannot be sustained. *Corn Products Refining Co.* v. *F. T. C.*, 324 U. S. 726; *F. T. C.* v. *Pacific States Paper Trade Association*,

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[2] In the present context, a bezel is the grooved rim or flange in which a watch crystal is set.

Appendix A

273 U. S. 52; *Continental Wax Corporation* v. *F. T. C.*, 2 Cir., 330 F. 2d 475; *National Trade Publications, Inc.* v. *F. T. C.*, 8 Cir., 300 F. 2d 790; *United States Retail Credit Association* v. *F. T. C.*, 4 Cir., 300 F. 2d 212; *Chain Institute, Inc.* v. *F. T. C.*, 8 Cir., 246 F. 2d 231.

I.

It is admitted by Benrus that during the period between 1955 and 1959, which was the period covered by the complaint and by the evidence, Benrus watches were "preticketed" before being distributed to the customers of Benrus. That is to say, each Benrus watch when it left the Benrus plant had attached to it or to its container a tag indicating a purported retail price for the watch.

Benrus admits further that during the period in question it advertised from time to time that prospective purchasers of Benrus Watches could obtain substantial trade-in allowances against the quoted or preticketed retail price by turning in old watches when new Benrus watches were acquired.

And Benrus admits still further that during a short period of time in 1958 it advertised, notably in the April 1958 issue of Reader's Digest, that an allowance of $5.00 could be obtained by presenting to Benrus dealers a detachable coupon or "allowance certificate" which was part of the ad.

The complaint charged that the preticketing itself was unfair and deceptive in that the preticketed price, which conveniently may be called the "list price", was substantially in excess of the prices at which Benrus watches were regularly and usually sold in the retail market, that the watches actually sold in the market at varying prices substantially below the list price, and that indeed during the relevant period there was no regular and usual retail market price for Benrus watches. It was and is the position of the Commission that this preticketing of list prices

created the impression in the minds of a substantial portion of watch purchasers that the list prices were in fact the usual and regular prices at which Benrus watches were sold at retail in the trade area, and that this alleged impression caused many individuals to buy Benrus watches at prices lower than list under the mistaken belief that they were thereby effecting a saving or "getting a bargain." The Commission considered that the practice in question had the tendency to induce purchasers to buy from Benrus dealers without shopping further, and thus that it had an adverse effect on competition in the retail watch trade.

The Commission also took the position that the advertising about trade-in allowances and allowance certificates was false and deceptive because it was geared to the allegedly deceptive list prices of the watches, and that the allowances were in fact fictitious. Moreover, it was said that Benrus dealers did not uniformly honor the allowance certificates when presented.

The Examiner found against Benrus with respect to the preticketing itself and with respect to the advertising of the allowance certificates, but dismissed the charge based on the advertising of trade-in allowances. The Commission found against Benrus on all three counts.

It is settled that deceptive preticketing of retail prices by a manufacturer of a product is unlawful, and it is immaterial that the actual "marking down" from the preticketed price is done by a retailer rather than the manufacturer. See *Rayex Corporation* v. *F. T. C.*, 2 Cir., 317 F. 2d 290; *Helbros Watch Co.* v. *F. T. C.*, C. A. D. C., 310 F. 2d 868; *Baltimore Luggage Co.* v. *F. T. C.*, 4 Cir., 296 F. 2d 608; *Clinton Watch Co.* v. *F. T. C.*, 7 Cir., 291 F. 2d 838; *Niresk Industries, Inc.* v. *F. T. C.*, 7 Cir., 278 F. 2d 337. Benrus does not question those principles; it simply contends that its practices with regard to list prices were not deceptive, and that the Commission's findings of deception and illegality with respect to those prices are not supported by substantial evidence.

Appendix A

In support of its contentions Benrus argues first that during the period under consideration by the Examiner manufacturers' list prices, although not without significance to consumers as rough guides to the "value" of products, as compared to the "value" of other products, and as indications of "ceiling prices" to be paid for the preticketed product, did not indicate to consumers that the list prices were in fact the regular, usual, or prevailing retail prices actually paid in the market for the preticketed product. Hence, Benrus urges, the consuming public was not deceived by preticketed prices even though they might have been substantially higher than actual prevailing prices or even though a product has no general or prevailing retail price. In support of that argument Benrus relies heavily on the results of a market research study, conducted by a firm known as Motivation Dynamics, Inc., which was undertaken on behalf of Benrus after the Commission issued its complaint.

Benrus argues next that in December 1963 the Commission issued, effective January 8, 1964, new "Guides Against Deceptive Pricing," and that under those new guides the practices complained of would not be considered deceptive. Benrus contends that its conduct should be measured by reference to the new guides, and that the Commission erroneously applied older criteria of deceptiveness.

Benrus asks that the portions of the Commission's order relating to preticketing be vacated or, in the alternative, that the case be remanded to the Commission for reconsideration in the light of the new guide lines.

Whether a trade practice such as preticketing of list prices or advertising with respect to manufacturers' list prices is deceptive depends in the last analysis on the impression which such a practice makes on the minds of the consuming public. What impression is made by a given practice is a question of fact for the Commission to determine, and the Commission's determination that a

practice is deceptive should not be disturbed by the courts unless arbitrary or clearly wrong. *Niresk* v. *F. T. C.*, supra; *Kalwajtys* v. *F. T. C.*, 7 Cir., 237 F. 2d 654; *Rhodes Pharmacal Co., Inc.*, v. *F. T. C.*, 7 Cir., 208 F. 2d 382.

The Commission has consistently taken the view, and has been upheld therein by the courts, that a manufacturer's list price creates in the minds of a substantial segment of the purchasing public the impression that such price is in fact the regular and usual retail price of the product in the market, and that a bargain is obtained if the product can be obtained at an actual price substantially lower than list.

Prior to the promulgation of the new guides the Commission held consistently that a list price was deceptive if it was substantially in excess of the prevailing actual retail price or if there was no generally prevailing retail price. And deception was considered established if there was a substantial volume of sales of the preticketed product at actual prices substantially less than list. Those were the criteria which the Examiner applied in his initial consideration of the case and which the Commission applied when it issued its opinion and proposed order in July 1963.

The new guides reiterate the Commission's view that preticketed prices indicate to a substantial portion of the purchasing public that those prices are the generally prevailing actual retail prices of the products involved, and that preticketing can be a deceptive and unlawful trade practice. The new guides, however, do reflect one significant change in the Commission's approach to the preticketing problem. Under the new guides the preticketing of a list price of a product will not be deemed deceptive if the preticketing is done in good faith, and if the list price "does not appreciably exceed the highest price at which substantial sales are made in (the) trade area."

As to the good faith of the manufacturer who pretickets retail prices, the new guides emphasize that the manufac-

turer, or other distributor who does the preticketing, "must in every case act honestly and in good faith in advertising a list price, and not with the intention of establishing a basis, or creating an instrumentality, for a deceptive comparison in any local or other trade area."

Benrus contends that in preticketing list prices it acted in good faith, and that substantial sales of Benrus watches were made at the list prices so that its conduct, if measured by the new guides, was not deceptive even if it would have been considered so under the old criteria. For the moment we pass over that particular contention.

Judging the conduct of Benrus by the former standards, we are persuaded that the Examiner and the Commission were justified in finding from the evidence of record that the preticketing of Benrus products and Benrus advertising referring to list prices of watches were deceptive practices and were unlawful.

The record in this case and the initial decision of the Examiner in *Majestic Electric Supply Co., Inc.*, FTC Docket No. 8449, indicate that there is a school of thought today in the field of retail marketing which holds that consumers are attaching less and less significance to list prices as indicia of actual retail market prices.

In the course of the hearings before the Examiner in this case Mr. Albert Shephard, the president of Motivation Dynamics, expressed the opinion that an "overwhelming majority" of watch purchasers consider list prices in the light of their impression that "most people nowadays pay less than list prices for watches that they purchase in the medium-priced field." He also stated that the impression of most people is that the list price of a product is not its usual and regular price, and that most people are aware that outlets exist where medium priced watches can be obtained for less than list and that more and more people are buying for less than list as time goes by.

Shephard expressed the further view that consumers tended to consider list prices as fixed ceilings. With re-

gard to list prices as measures of "value," as opposed to "price," he stated that it was his opinion that if the same manufacturer lists one price for one brand of watch and lists a higher price for another brand watch customers will consider that the latter brand is "worth" more than the former, and that if two manufacturers list similar prices for similar brands, customers will consider that the product of one manufacturer is "worth" about as much as that of the other.

But even if Mr. Shephard's testimony and the report of his firm are taken at face value, we think that the Examiner and the Commission were justified in concluding that list prices still indicate actual regular retail prices to a substantial percentage of the watch buying public, a percentage that is entitled to protection from deceptive preticketing.

The Examiner and the Commission also found that there were substantial sales of Benrus watches at retail prices substantially less than the list prices, that in numerous instances purchasers acquired Benrus watches at the same lower than list prices regardless of whether they turned in old watches as trade-ins, and that Benrus dealers did not uniformly honor the allowance certificates to which reference has been made. Those findings are clearly supported by substantial evidence.

The Commission found that Benrus sells watches to catalog and mail order houses and supplies those purchasers with inserts for their catalogs. Those inserts, prepared by Benrus, refer to the list prices of the watches and then show "code prices" which represent the actual retail prices which consumers are to pay for the watches if they order from the catalog. Those code prices, prescribed by Benrus itself, are substantially lower than the list prices. Those findings are likewise supported by the evidence and, indeed, are not challenged here.

Returning now to the contention of Benrus based on the new guides, it must be remembered that the new

guides had not been promulgated when the Examiner filed his initial decision and when the Commission filed its opinion and issued its proposed order. Nor had they been promulgated when Benrus objected to the proposed order. It is true that the final order of the Commission was filed nearly two months after the effective date of the new guides, but, as has been seen, the case was actually decided under the old criteria.

It would not have been improper, of course, for the Commission to have reviewed the record in the light of the new guides before issuing its final order in February 1964, but we do not feel that it was its mandatory duty to do so, or that it abused its discretion when it did not do so.

In this connection we note that it is the announced policy of the Commission to interpret all outstanding cease and desist orders as though they expressly incorporated the provisions of the new guides, regardless of the actual language appearing in the orders. See *Heavenly Creations, Inc.* v. *F. T. C.*, 2 Cir., 339 F. 2d 7; and *In re Clinton Watch Co.*, F. T. C. Docket No. 7434.

In concluding that the contention based on the new guides must be rejected we do not overlook the fact that on the same day on which the Commission's final order in this case was filed, the Commission handed down its opinion in *Majestic Electric Supply Co., Inc.*, supra. That case, like this one, involved among other things preticketing of retail prices during a period prior to the effective date of the new guides. And in that case, as in this, the initial finding of the Examiner, based on the old criteria, was that the respondent had been guilty of deceptive preticketing. Upon review the Commission reversed that finding. It was said:

> "The evidence in this case establishes that some of the articles listed in respondents' catalog were not usually and regularly sold in certain communi-

ties in which the catalog was disseminated at the represented higher 'Retail' prices. But no showing was made, and, in view of the allegations of the complaint, no attempt was made to show, that the so-called 'Retail' prices were appreciably in excess of the highest price at which substantial sales of the merchandise were being made throughout the area in which respondents' catalog was circulated. Consequently, the record does not support a finding that respondents' claims as to the 'Retail' prices of their merchandise were deceptive under the new pricing guides. That part of the complaint challenging respondents' use of such claims will be dismissed."

To distinguish *Majestic Electric* from the case at hand it is sufficient to say that in *Majestic Electric* the Commission decided the case after the new guides had gone into effect, whereas here the actual agency decision was made before the effective date of the guides. As has been said, we do not feel that the Commission abused its discretion in refusing to reconsider the merits of the case after the new guides became operative.

The record reveals that on July 12, 1962, Benrus filed a motion requesting the Commission to stay proceedings herein pending an industry-wide investigation of pre-ticketing practices of watch manufacturers. On September 11, 1962, the Commission determined that it would hold that motion in abeyance pending decision on the merits. The Commission never ruled on the motion as such, but it overruled it by implication when it entered its cease and desist order. Benrus complains of that action of the Commission, but we think that the matter lay within the discretion of the Commission and will not disturb the Commission's exercise of that discretion.

II.

Taking up next the controversy with respect to Benrus guarantees and the advertising thereof, the record re-

flects that prior to January 1, 1959, Benrus watches were guaranteed against defects in material and workmanship. Those guarantees were honored, but the owner of a Benrus watch who sent the instrument in to the company for repair was required to pay a service charge of $1.00 for handling and postage even though the defect to be repaired was covered by the guarantee. The terms of the guarantee were set forth correctly in the certificate of guarantee accompanying each new Benrus watch; that certificate also reflected the service charge requirement but did not do so clearly, and the requirement appeared in small print some distance away from the guarantee provisions proper. In Benrus advertising statements appeared that Benrus watches were "guaranteed," or "fully guaranteed," or "guaranteed by Benrus." The advertisements did not disclose any limitation on the guarantee and said nothing about the service charge.

Several months prior to January 1, 1959, Benrus adopted and put into effect as of that date, which was prior to the issuance of the Commission's complaint, an entirely new guarantee policy. Under the new policy all Benrus watches are guaranteed without any limitation and without any service charge for a period of three years. That is to say, under the new policy if a Benrus watch gets into disrepair for any reason during the period of the guarantee it will be repaired or replaced without any cost to the owner.

The Examiner dismissed the charges based on alleged deceptive practices relating to the guarantees and advertising thereof on the ground that in view of the new policy which has been mentioned a cease and desist order would not be appropriate. He also found that actually there was no deception under the original policy.

The Commission reversed the Examiner on this phase of the case, holding that the original policy was deceptive. The new policy was not discussed by the Commission.

Appendix A

In reviewing the findings of the Commission we must consider the record as a whole. While the findings of the Examiner were certainly not binding upon the Commission, they are part of the record, and are entitled to consideration in appraising the correctness of the ultimate findings of the Commission. *Universal Camera Corporation* v. *N. L. R. B.*, 340 U. S. 474; *Evis Manufacturing Co.* v. *F. T. C.*, 9 Cir., 287 F. 2d 831; *Minneapolis-Honeywell Reg. Co.* v. *F. T. C.*, 7 Cir., 191 F. 2d 786.

The final order of the Commission commands Benrus to cease and desist from representing, directly or by implication, that its merchandise is guaranteed "unless the nature and extent of the guarantee and the manner in which the guarantor shall perform thereunder are clearly and conspicuously disclosed."

The facts about the original guarantee policy and the advertising thereof are not in dispute, and we cannot say that the Commission's finding of deception was arbitrary or impermissible even though we may entertain some doubt as to whether the matter complained of had any real tendency seriously to deceive anyone. *Cf. Parker Pen Co.* v. *F. T. C.*, 7 Cir., 159 F. 2d 509. We accordingly accept the Commission's finding of deception and illegality with respect to the original policy.

Whether in view of the change of policy which has been mentioned the Commission should have ordered Benrus to cease and desist from deceptive representations as to guarantees presents a more serious question.

It is well established that a mere abandonment of a deceptive practice does not necessarily render a cease and desist order improper. This is true because an abandoned practice may be resumed. Cease and desist orders are not punitive, and they operate prospectively. Whether such an order should be entered in a case where the unlawful practice has been abandoned is a question which rests within the sound discretion of the Commission. See in this connection: *Giant Foods, Inc.* v. *F. T. C.*, C. A. D. C.

322 F. 2d 977; *Marlene's Inc.* v. *F. T. C.*, 7 Cir., 216 F. 2d 556; *New Standard Publishing Co.* v. *F. T. C.*, 4 Cir., 194 F. 2d 181; *Oregon-Washington Plywood Co.* v. *F. T. C.*, 9 Cir., 194 F. 2d 48; *Deer* v. *F. T. C.*, 2 Cir., 152 F. 2d 65; *Eugene Dietzgen Co.* v. *F. T. C.*, 7 Cir., 142 F. 2d 321.

The Commission did not quarrel with the finding of the Examiner that the original deceptive practices relative to guarantees had been abandoned, and we think that the Commission might well have upheld the Examiner in dismissing the charge relating to the guarantees. We cannot say, however, that the Commission in determining to order Benrus to cease and desist from deceptive representations as to guarantees, notwithstanding its abandonment of the practice originally complained of, was an abuse of discretion or that in the exercise of its discretion the Commission failed to act "within the bounds of reasonableness." *Marlene's, Inc.* v. *F. T. C.*, supra, 216 F. 2d at 559. As we have said, the order is not punitive, and compliance with it will not be hurtful or burdensome.

III.

The controversy about the use of the term "shockproof" or "shock protected" in Benrus advertising is a minor matter. It appears that one or both of those terms were inadvertently included in a single advertising mat and appeared in two Benrus advertisements. There is evidence that no watch is proof against shock and that no watch can be protected completely from damage due to shock. Watches can be made which are "shock resistant" or "shock absorbing," and in general Benrus has employed those terms in its advertising and has refrained from using the terms of which the Commission complained.

The Examiner found that the use of the terms "shockproof" and "shock protected" was not absolutely prohibited; he also found that Benrus's use of those terms was isolated and inadvertent and did not require the issuance

of a cease and desist order. The Commission reversed the Examiner and included within the prohibition of its order the use of the terms in question.

Again we are unable to say that the Commission abused its discretion, although were the question one for our independent determination we might well find ourselves in agreement with the Examiner.

IV.

In Paragraph Ten of the complaint it was charged that Benrus watches "are in cases, the bezels of which have been treated or processed to simulate or have the appearances of precious metals, that is, gold or gold alloy." It was alleged that the cases were not marked so as to disclose that the bezels were composed of base metal, and it was charged the practice of Benrus "in offering for sale and selling watches with bezels which have been treated or processed to simulate or have the appearance of precious metal as aforesaid without disclosing clearly the true metal composition of said bezels is misleading and deceptive and has the tendency and capacity to lead members of the purchasing public to believe that the said bezels are composed of precious metal."

The Examiner construed the complaint as charging that Benrus had misled the public into believing that there was gold in the bezels when in fact there was none. The Examiner found as a fact that although the bezels were in the main composed of base metal, they were surfaced with a coat of gold plate and so did in fact contain some gold. On the basis of that finding, the Examiner dismissed the charge.

Upon review the Commission concluded that the Examiner had construed the complaint too narrowly, and that it was sufficiently broad to charge a violation of the Commission's Trade Practice Rules for the Watch Case Industry, promulgated in 1948, and appearing as Part 174

of Title 16 of the Code of Federal Regulations. The Commission found that Benrus had violated the rule appearing as 16 C.F.R. § 174.2(9) relating to flashed or deficiently plated cases.[3]

That Rule provides in substance that in respect of watch cases composed of a stock base metal plated or coated with a precious metal of a thickness of less than 1½ 1000 of an inch over all exposed surfaces after completion of all finishing operations, the case shall be marked so as to show unambiguously and nondeceptively that the case is base metal or that it is base metal which has been flashed or coated with a very thin and unsubstantial coating, and that such further disclosure shall be made and action taken as to prevent deception or misunderstanding.

Two Benrus bezels were introduced in evidence. One of them had a plating of 18.46 carat gold of a depth of .00083 of an inch; the other had a plating of 18.32 carat gold of a depth of .0007 of an inch. There was evidence that Benrus bezels had the appearance of gold or gold alloy, and they were not marked in accordance with the rule. We hold that the finding of a violation with respect to the bezels is supported by substantial evidence.

With respect to the controversy over the bezels, Benrus contends principally in its brief that it was convicted of a violation with which it was not charged and which it had no opportunity to meet. In the Commission's opinion it is said:

> " * * * The position of counsel supporting the complaint as to the interpretation of this paragraph of the complaint was clearly made known as the close of the case-in-chief in his reply to respondents' memorandum in support of motion to dismiss. It is

[3] 16 C. F. R. § 174.1(a) defines a watch case as including the bezel.

> in this document that the complaint counsel refers to the 'thin skinned' products of respondents. Accordingly, the respondents were informed of this construction of the complaint and they had complete and adequate opportunity to defend on the issue. We believe it fair to say that the issue was directly brought into question by the language of the complaint."

We have examined the memorandum filed by Benrus in support of its motion to dismiss made at the close of Commission's case-in-chief and have also examined the reply memorandum filed by counsel supporting the complaint. In the Benrus memorandum counsel referred to the case of *In re Theodore Kagan* (sic) *Corporation,* F.T.C. Docket No. 6893, affirmed *Theodore Kagan Corporation* v. *F.T.C.,* C.A. D.C., 283 F. 2d 371, and pointed out that the bezels involved in that case had been colored to simulate gold but actually contained no gold. In the reply memorandum counsel supporting the complaint referred to the Benrus bezels as being "thin skinned," and then commented upon the low gold content of the electroplating. In view of this exchange between counsel we think that the Commission was justified in holding that Benrus was charged with knowledge that the Commission was complaining of the low gold content of the bezels rather than urging that the bezels contained no gold or gold alloy, and in concluding that Benrus had full opportunity to meet that complaint.

Benrus complains that the Commission's order as related to bezels prohibits practices with respect to the sale of watches which have been electrolytically gold plated which were not involved in this proceeding and which do not, in any event, constitute false and deceptive practices.

As to that particular complaint the record reflects that after Benrus filed in this Court its petition to review the Commission's order, it filed with the Commission a petition to reopen the proceeding to secure an adjudication

of the sufficiency of the marking "20 Micron Gold Electroplate" appearing on the cases of certain watches which it has been marketing. On July 31, 1964, the Commission denied that motion but stated that it was directing its Bureau of Industry Guidance to institute a proceeding to determine whether revision of 16 C.F.R., § 16.172.2(9) was required, and that if it was determined that there should be a revision, Benrus might then request an appropriate modification of the Commission's order. We are not advised as to whether the revision proceeding has been instituted or completed or as to the result of such proceeding, if completed. In any event the order denying Benrus's motion to reopen is not before us.

V.

Complaint is made that the order embraces all Benrus products whether or not related to the watch industry. Once violations of the law have been shown to exist, the Commission has broad discretion in devising a remedy adequate to prevent the same or similar violations in the future. *F.T.C.* v. *Broch,* 368 U. S. 360. Specifically, if deceptive practices have been employed with regard to certain products distributed by a manufacturer, such practices may be prohibited with respect to all of his products; the Commission is not required to limit its order to the particular product or products with respect to which violations have been found. *Carter Products, Inc.* v. *F.T.C.,* 5 Cir., 323 F. 2d 523; *Niresk Industries, Inc.* v. *F.T.C., supra; Consumers Sales Corporation* v. *F.T.C.,* 2 Cir., 198 F. 2d 404. In our opinion the Commission did not exceed its discretion in covering all Benrus products in its order.

VI.

In No. 17,692 the individual petitioners, Robert Weil, Martin J. Rasnow, and Leo Hyman, complain that they

were included in the order as individuals. And a similar complaint is made by Clifford Seigmeister in No. 17,821.

As far as Rasnow and Hyman are concerned, it appears from the order of the Commission that the proceedings against them as individuals were dismised, and no more need be said about them.

As to Weil and Seigmeister, the complaint alleged that they were among the individuals who formulated, directed, and controlled the policies and practices of the corporate respondents.

On March 9, 1959, the corporate defendants and certain individual defendants, including Seigmeister, but not including Weil, filed an answer in effect admitting that certain of the individual respondents, among whom was Seigmeister, did in fact formulate, direct, and control the policies and practices of the corporate defendants. On April 13, 1961, Weil filed a belated answer denying that "he formulates, directs, or controls, or has formulated, directed or controlled any of the acts and practices of the corporate respondents alleged in the complaint, or that he has personal knowledge of such acts and practices."

The Seigmeister petition, which was dated and filed May 25, 1964, alleges that petitioner "resigned as an officer of the Benrus Watch Company, Inc. approximately five years ago and has not been connected with or associated with that company since his resignation."

The Examiner found specifically that Weil and Seigmeister formulated, directed, and controlled corporate policies and practices, and they were included as individuals in the Commission's order.

Neither the answer of Weil nor the petition of Seigmeister is verified, and neither has called the attention of the Court to any evidence indicating that they did not formulate, direct, and control corporate policies and practices.

Both Weil and Seigmeister say that the record contains no evidence that they as individuals had anything to do with Benrus policies or practices. Counsel supporting the complaint had a right to rely on the admission in the answer filed on behalf of Seigmeister and others, and Weil did not deny that he was an officer of Benrus which, standing alone, justifies the inference that he had something to do with policy.

It may very well be true that when Weil filed his answer, and when Seigmeister filed his petition for review, those respective individuals no longer had anything to do with Benrus policies, but that would not make their inclusion in the order erroneous if they occupied policy making or directing positions during the period of the violations charged in the complaint. *Consumers Sales Corp.* v. *F.T.C.*, supra. And when carefully read, their pleadings do not actually deny that between 1955 and the date of the filing of the complaint in 1959 they were engaged in formulating, directing, and controlling Benrus policies and practices.

From what has been said, it follows that the order of the Commission is in all respects affirmed and enforcement thereof decreed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

(JUDGMENT OF COURT OF APPEALS)

Final Decree Affirming and Enforcing Order to Cease and Desist

These matters having come on to be heard on March 11, 1965, upon the petitions for review of an order of the Federal Trade Commission issued on February 28, 1964, the record certified to the Court by the Federal Trade Commission, briefs and oral argument, and the Court having fully considered the matters and having rendered its decision on November 4, 1965, directing affirmance and enforcement of the Commissions order to cease and desist;

Now, therefore, it is hereby ordered, adjudged and decreed that the order to cease and desist of the Federal Trade Commission be, and it hereby is, affirmed, and that the petitioners, with the exception of Martin J. Rasnow and Leo Hyman (who are not named in the Commission's order) be, and they hereby are, commanded to obey the said order and to comply therewith.

Entered: December 2, 1965.

APPENDIX C

Opinion of the Commission

(Filed July 31, 1963.)

By Anderson, Commissioner:

Respondents in this matter were charged in the complaint with various misrepresentations in violation of Section 5 of the Federal Trade Commission Act. The corporate respondents are Benrus Watch Company, Inc., and Belforte Watch Company, Inc., both corporations organized and doing business under the laws of the State of New York. Belforte Watch Company, Inc., is a subsidiary of Benrus Watch Company, Inc. The hearing examiner, in his initial decision, filed May 24, 1962, found that part of the charges were sustained and part were not. He ordered those practices to be discontinued which he found to be unlawful.

Counsel supporting the complaint and respondents have both filed exceptions to the initial decision. The former excepts to the dismissal of certain charges as follows: (a) alleged misrepresentation as to the savings from turning in an old watch and the savings involved in the use of "allowance certificates", (b) the use of the term "guaranteed", (c) the use of "shock proof" and "shock protected", and, finally, (d) misrepresentation as to the composition of certain bezels (rims in which watch crystals are set). Respondents except to the examiner's findings that respondents misrepresented the usual and regular resale prices of their watches, that respondents' dealers did not uniformly honor "allowance certificates" and to the inclusion in the order of certain named respondents.[1]

[1] The allegations under Paragraph Seven of the complaint charging misrepresentation as to the availability of certain watches from dealers were dismissed by order of the examiner on the ground of a failure to show a prima-facie case. No exception was taken to this action.

Appendix C

We will proceed to consider the facts for each alleged misrepresentation charged in the complaint as to which an exception to the examiner's findings thereon has been taken.

MISREPRESENTATION AS TO USUAL AND REGULAR RETAIL PRICES

The complaint first charges respondents with falsely representing certain amounts as the usual and regular prices of their products through both preticketing and advertising statements. Respondents concede in their answer that they have attached or caused to be attached price tickets to their watches upon which certain amounts are printed and that they have disseminated advertising containing representations as to the retail prices of their watches.[2] They assert, however, that they had no knowledge sufficient to form a belief as to whether the prices printed on the tickets and the advertisements have been or are in excess of the usual and regular retail prices.

The hearing examiner found that the preticketed prices and the prices listed in the advertising were not the generally prevailing retail prices for respondents' watches, that prices charged for respondents' watches by different dealers in the same trade area varied considerably so that no single uniform retail price existed, and that respondents' watches were widely sold in the same trade area at a variety of prices significantly lower than those stated on its price tickets and advertising.

Preticketing refers to the practice of supplying with the watch a ticket upon which is printed a represented retail price. For convenience, the term "preticket" will hereafter be used, unless otherwise stated, to refer to the

[2] Admissions by individuals named in the complaint were only as to their capacities as officers and employees of corporate respondent.

prices appearing on the tickets supplied with the watches and to respondents' representations as to retail prices in other advertising. It is used interchangeably because for the same model of watch the preticketed price and the advertised retail price were the same.

The record supports the charge of false and fictitious preticketing. We will proceed to review evidence on this issue.

Respondent Benrus had two categories of customers: catalog customers and retail customers; respondent Belforte had three: catalog, jobbing and retail customers. The catalog customers distribute merchandise by means of catalogs and in some cases by retail outlets. The customers of the catalog houses include industrial accounts, small retailers and consumers. Many of the catalog houses sell large amounts of merchandise to consumers. Some of them sell respondents' products to consumers almost exclusively. For example, Zeff Distributing Company, Inc., a catalog house, sold approximately 85% of its purchases of respondents' watches to consumers.

The catalogs distributed by the catalog houses typically contain code numbers which reveal the actual selling prices of the articles. They also contain other figures higher than the actual selling prices which purport to be the suggested retail prices or the usual and regular prices for the articles. Respondents provide inserts for these catalogs, which inserts contain a display of their watches and price information, including the representations as to usual and regular retail prices. One such catalog insert sheet prepared by respondents is identified Commission Exhibit 91. As an example of pricing representations thereon, the "Hampton" watch is identified with the following reference:

"36-32080–1908 .... 39.39"

Appendix C

The actual retail price which the customer pays is shown by the last four digits in the first part of the reference, i.e., "1908" means the actual price is $19.08. The last four figures "39.39" are a representation that the suggested retail price or the usual and regular retail price is $39.39.

Samuel Felderman, vice president of Benrus Watch Company, testified that only catalog houses were solicited by respondents for the purchase of certain designated watches such as those identified in Commission Exhibits 91 and 92. According to the testimony, Commission Exhibit 92 was a list distributed exclusively to the catalog houses. Mr. Felderman's further testimony was that such watches were available to other customers but he did not know whether any non-catalog customers purchased them. We may infer from the evidence, however, that few, if any, of such watches were sold to other than catalog houses. The finding is that respondents offered and sold certain groups of watches to catalog houses and other groups of watches to other customer categories. The record shows that the catalog houses regularly sold the watches for substantially less than the prices represented to be the usual and regular retail prices. Their usual and regular retail prices were the lower actual prices charged their customers (the "coded" prices). The conclusion is that the generally prevailing retail prices were such "coded" prices and that these were substantially less than the prices represented by respondents as the "retail" prices. Accordingly, the respondents' representations as to the regular retail prices were false and deceptive. Leeds **Travelwear, Inc.**, Docket No. 8140 (Commission decision, July 20, 1962). Cf. **Helbros Watch Company, Inc., et al. v. Federal Trade Commission**, 310 F. 2d 868 (D. C. Cir. 1962).

The record additionally supports the examiner's finding that respondents' watches were widely sold in the same trade area at prices significantly less than the advertised

or preticketed retail prices. Kansas City, Missouri, is one such area. The evidence taken in this market includes testimony from various retail distributors, all of whom sold respondents' watches, or at least certain groups of respondents' watches, at prices substantially below the preticketed prices. The distributors in Kansas City included jewelry stores or the jewelry departments of stores, a consumer buying organization, catalog houses selling through catalogs as well as through retail outlets, and a wholesale concern which sold at retail. Mr. Hickock, of Emery, Bird, Thayer Dry Goods Company, testified that the watches identified as Superior 25, Space Ranger, Diamond Tiara, and Diamond Glitter all sold at prices under the preticketed amount. Included in his testimony was the statement that the Space Ranger and the Diamond Glitter models were preticketed at $59.50 and sold for $34.50. Mr. Keller of Jones Stores testified that watches identified as Space Ranger and Diamond Glitter were preticketed at $59.50 (stipulated by respondents' counsel) and were sold at $34.50.

The concerns in the Kansas City area selling at retail through catalogs as well as through retail outlets from which testimony was received were Meyer Jewelry Company and Zeff Distributing Co., Inc. The witnesses representing these businesses testified to the effect that in all instances sales were made at prices below respondents' preticketed prices. Other witnesses from Kansas City included Gerald Jaben, of Employers Consumer Organization, Inc., and David Dolginow, of Dolginow's Wholesale Company (a concern selling at retail). The last witness testified that he shopped other stores in competition with his kind of business on a regular basis and that he never found any selling at the preticketed prices. It is clear from the testimony that the differences between the preticketed prices and the actual selling prices were substantial.

The evidence from the Kansas City, Missouri, market, which includes the testimony of representative retailers

selling in that market, such as dealers, catalog houses, discount houses and other types of retailers, shows in substance that a number of retailers regularly sell respondents' watches at prices substantially below the preticketed prices. We find and conclude, therefore, that in this market the preticketed prices were not the generally prevailing retail prices or the usual and regular prices for respondents' watches.

The hearing examiner received into evidence a study entitled "A Motivation Pilot Study", identified as Respondents' Exhibit 26. Albert Shepard, president of Motivation Dynamics, Inc., the firm which prepared this study, testified to the effect that it shows the patterns of perception of price among watch purchasers. The study is based upon interviews with customers. The hearing examiner gave no weight to the study because he found that test III therein indicates unequivocally that a substantial segment of the public would be deceived by respondents' price representations. Respondents take exception to this finding.

We do not agree, nor does it appear that the examiner found, that the study shows that 86 percent of the purchasers of watches interviewed would not be deceived. The examiner decided the question by making the assumption merely for the purpose of his analysis that the study showed a high level of nondeception. The fact is it shows nothing of the kind. If it does show something about "the patterns of perception of price among watch purchasers" as Mr. Shepard testified, it shows very little if anything as to the impression which prospective purchasers or purchasers have in seeing the prices which respondents place on tickets attached to watches or the prices they include in advertising. The impression of the representation is the critical issue. As indicated, the evidence clearly shows that the prices on the tickets were not

the regular and usual prices of respondents' watches. The only question, therefore, is what was represented by such tickets as to price. This the study fails to answer.

Moreover, even if the study does show 86 percent non-deception as assumed by the examiner, which it does not, this still leaves 14 percent of the prospective purchasers who may be deceived, and, of course, these are entitled to protection. **Helbros Watch Company, Inc., et al. v. Federal Trade Commission,** 310 F. 2d 868, 869 (D. C. Cir. 1962).

Preticketing at fictitious prices must be deemed to have the tendency of deceiving the public as to the savings afforded by the purchase of a product thus tagged, as well as to the value of the product acquired. The practice places a means of misleading the public into the hands of those who ultimately deal with the consumer. **Clinton Watch Company, et al. v. Federal Trade Commission,** 291 F. 2d 838, 840 (7th Cir. 1961). See also **Baltimore Luggage Company v. Federal Trade Commission,** 296 F. 2d 608 (4th Cir. 1961).

We find and conclude that respondents by misrepresenting their usual and regular prices engaged in false and misleading advertising, and further that respondents, by furnishing advertising materials, such as catalog insert sheets, advertising mats and other advertising to customers, provided their customers with a means of deceiving the public as to the usual and regular prices.

Represented Savings on Trade-Ins.

The next allegation, which charge was dismissed by the examiner, concerns the trade-in allowance. The complaint alleges that advertisements stating that a designated amount would be given on a trade-in on an old watch represents that the purchaser will save such amount

over the usual and regular retail price and that, in fact, there is no saving of the designated amount or any amount below the usual and regular price. A similar charge is made in connection with the advertising promotion involving "allowance certificates". An "allowance certificate" is a coupon or certificate which states that the holder will be granted a designated allowance upon the purchase of a new watch. The hearing examiner dismissed the trade-in charge, and in this we believe he erred. Commission Exhibit 64 is a typical advertisement offering trade-in allowances. It contains the following price representation:

Price	$59.50
Trade-In Allowance	$20.00
	$39.50
$5.00 extra for a coupon from Reader's Digest	$ 5.00
You Pay Only	$34.50

We find that this is a representation that the prospective purchaser will save $20.00 (for a trade-in) and $5.00 (for the coupon) from the usual and regular price, which price is represented to be $59.50. Retailers sold the watches for which allowances were advertised at the same price whether or not the customer brought in the old watch or the coupon. For instance, in the above illustration the watch was sold for $34.50 whether or not it was sold with a trade-in and the coupon. Dealers so testified (Transcript 301, 325). This testimony was from dealers in the Kansas City market, an area in which we have found that the preticketed prices were not the usual and regular prices. Accordingly, the prospective purchaser, believing he would have a saving of $20.00 from the usual and regular price, falsely stated to be $59.50, in fact had no such

saving from the true usual and regular price. Similarly, there was no saving of $5.00 for the coupon. The reduction given to the purchaser, if any, was from the fictitious price of $59.50, not from the usual and regular price as represented. In some cases, moreover, dealers did not honor the allowance certificates, and the examiner so found.

We find and conclude that respondents' representations as to savings in connection with trade-in allowances and allowance certificates and as to the honoring by dealers of allowance certificates were misleading and deceptive. Furthermore, they provided means to the dealers for misleading and deceiving the purchasing public.

GUARANTEE

The complaint alleges deception in connection with use of terms such as "guarantee", "fully guaranteed", and "guaranteed by Benrus". The charge is, in effect, that the terms, conditions and extent to which such guarantee applies and the manner in which the guarantor will perform thereunder are not clearly and conspicuously disclosed in close conjunction with guarantee representations. The examiner dismissed the charge from which counsel supporting the complaint has taken exception.

Respondents have admitted as to the charge on guarantees as follows:

> "b. Admit that respondents have from time to time represented in advertising, that certain of the corporate respondents' watches are guaranteed.
>
> "c. Admit that respondents have represented in some certificates accompanying certain of the corporate respondents' watches that the sum of one dollar must be enclosed with watches returned for servicing, to defray handling charges; and that such in-

formation has not been set forth in advertising. State that respondent Benrus has made no such representations in any such certificates accompanying its watches since on or about January 1, 1959."

Thus, respondents have admitted representing their watches as guaranteed without disclosing a service charge. This is an important limitation on respondents' guarantee liability, and the failure to reveal such limitation has the tendency and capacity to mislead and deceive the purchasing public. **Parker Pen Co. v. Federal Trade Commission,** 159 F. 2d 509 (7th Cir. 1946). In addition, the record shows that respondents have referred to guarantees in their advertising representations in a deceptive manner. For instance, Commission Exhibit 61, a guarantee certificate, represents that there is a guarantee on the watch referred to but does not clearly disclose that a service charge is made for sending the watch to respondents. The fact that there is a minimum charge of $1.00 on all watches returned for repair or adjustment is inconspicuously stated in small print remote from the word "guarantee." Accordingly, it is found and concluded that respondents have engaged in deceptive representations in connection with guarantees on their watches. Additionally, by furnishing such representations to their dealers they have provided them with a means of deception. The Commission has prohibited deceptive guarantee claims in watch cases, including the following: **Helbros Watch Company, Inc.,** Docket No. 6807, aff'd **Helbros Watch Company, Inc., et al. v. Federal Trade Commission,** 310 F. 2d 868 (D. C. Cir. 1962); **Hilton Watch & Clock Co., Inc.,** Docket No. 8402; and **The Clinton Watch Company,** Docket No. 7434, aff'd **Clinton Watch Company, et al. v. Federal Trade Commission,** supra. See also the Commission's Guides Against Deceptive Advertising of Guarantees, adopted April 26, 1960. These provide in part that any guarantee

in advertising shall clearly and conspicuously disclose (a) the nature and extent of the guarantee, (b) the manner in which the guarantor will perform, and (c) the identity of the guarantor.

"SHOCK PROOF" AND "SHOCK PROTECTED".

The complaint charges that respondents falsely represented their watches as "shock proof" and "shock protected." The hearing examiner dismissed this charge on the ground that the evidence is insufficient. He stated that, to issue an order on the basis of what appears to be a single inadvertent inclusion of a term in advertising would be inappropriate and unjustified. The issue, however, is not so narrow since respondents (except Belforte) admitted in their answer that from time to time they represented certain of respondents' watches as "shock proof" or "shock protected." Commission Exhibits 164 and 171 show the use of the words "shock proof" in advertisements. Accordingly, the examiner's dismissal on the ground of a single violation appears to be clearly in error.

The testimony in the record is to the effect that no watch is absolutely protected against shock or is "shock proof." Henry B. Fried, a teacher of watch making for the New York City Board of Education and an expert in watches, testified in substance that the devices used to cushion shock in watches do not make them shock proof and that at the most such devices provide only shock resistance for certain parts of the watch. Such is revealed in the following colloquy with the examiner:

"Hearing Examiner Buttle: . . .

Is there any such a thing, Doctor, as a shockproof watch?

"The Witness: There is no such thing as a shockproof watch in the sense that the watch will break, can break, and does break.

"Hearing Examiner Buttle: So that when you use terminology 'shockproof'—

"The Witness: It is too broad.

"Hearing Examiner Buttle: —it is a misnomer?

"The Witness: It is too inclusive and includes a field far beyond its potential."

This testimony applied to respondents' use of the term "shock proof" as well as to use of the term generally in the watch industry. Respondents themselves seem to recognize the inappropriateness of the term "shock proof" as applied to their watches since the testimony is that they have a current policy not to use the term in their advertising copy.

The hearing examiner, in dismissing the charge as to "shock proof" and "shock protected," cites the trade practice rules relating to such terms promulgated for the watch industry, April 24, 1947 (16 C. F. R. 170.3). Rule 3 (a) of these rules provides in substance that it is an unfair trade practice to use the term "shock proof" and other terms relating to shock protection under any false, misleading or deceptive circumstances or in any manner having the capacity and tendency or effect of misleading or deceiving the purchasing public or of aiding sellers in misleading the public. To use the terms referred to in any false or deceptive manner would constitute a violation of Section 5 of the Federal Trade Commission Act. Their use in accordance with Rule 3 (a) would be deemed to be compliance with the law. The examiner held that to prove a violation of law, counsel supporting the complaint must show not only that a term such as "shock proof" was used but that it was used in combination with other representations so as to convey the impression that the watch afforded protection from

damage beyond that actually afforded. He erred in this holding because nothing in Section 5 of the Federal Trade Commission Act or the rule referred to sets forth such a standard. It is well established on this record that respondents have used the term "shock proof" falsely. They have represented their watches as "shock proof" when in fact the watches are not shock proof. Accordingly, we find and conclude that such representation is false and deceptive and that the furnishing of material containing this term to customers has provided them with a means of deception.

METAL CONTENT OF BEZELS.

The complaint charges deception as to the metal content of bezels. Specifically, Paragraph Ten thereof alleges that bezels treated or processed to simulate gold or gold alloy were not marked clearly to disclose that they are composed of base metal and that this is deceptive. Deception is also charged in connection with using the term "chrome-top case" on bezels not composed throughout of chromium or chrome steel. As to the latter, there is insufficient evidence to prove the charge. However, the examiner erred in dismissing the charge of deception involved in the practice of simulating precious metal. He dismissed the charge because he found as a fact that the bezels were electroplated and contained a trace of gold. We think that he interpreted the language in the complaint too narrowly.

Paragraph Ten states in part, "Respondents' watches are in cases, the bezels of which have been treated or processed to simulate or have the appearance of precious metal, that is, gold or gold alloy. Said watch cases are not marked to disclose clearly that the bezels are composed of base metal." This language is broad enough to cover non-precious or base metal as well as metal containing a trace of gold where the gold content is so small as to

be insignificant. The essence of the charge, which is deception as to gold content, is not altered by the fact that the bezels may contain insignificant quantities of gold. We note that the Trade Practice Rules for the Watch Case Industry, promulgated January 30, 1948 (16 C. F. R. Part 174) in effect include, in the category of base metal, metal which has been flashed or coated with a very thin and unsubstantial coating of precious metal. Thus, where the complaint alleges that the watch cases were not marked to disclose clearly that the bezel was composed of base metal, the term "base metal" may be construed as meaning not only metal without gold but also metal with an insignificant quantity of gold. The position of counsel supporting the complaint as to the interpretation of this paragraph of the complaint was clearly made known at the close of the case-in-chief in his reply to respondents' memorandum in support of motion to dismiss. It is in this document that complaint counsel refers to the "thin skinned" products of respondents. Accordingly, the respondents were informed of this construction of the complaint and they had complete and adequate opportunity to defend on the issue. We believe it fair to say that the issue was directly brought into question by the language of the complaint.

Two of respondents' unmarked bezels were put in evidence and identified as Commission Exhibits 174 and 175. Witnesses testified that these bezels had the appearance of gold or gold alloy. Tests of the bezels disclosed that they had gold coverings, respectively, of .00083 of an inch of 18.46 karat gold and .0007 of an inch of 18.32 karat gold. The report of the test is identified Commission Exhibit 179 A-B. The test document further reveals that the gold coating on both bezels referred to had been applied by electroplating.

From the exhibits themselves and testimony of record it is clear that the bezels tested have the appearance of

gold or gold alloy. It is also established that they do in fact contain some gold. The mere presence of gold in the coatings, however, does not necessarily mean that markings are unnecessary to prevent deception. A purchaser who is led to believe from appearances that articles are made of substantial gold, when they are only base metal with an insignificant coating of precious metal, would be deceived. **Cf. Theodore Kagen Corp. v. Federal Trade Commission,** 283 F. 2d 371 (D. C. Cir. 1960), **cert. denied,** 365 U. S. 843. There the court sustained the Commission in its holding that the base metal bezels of respondents in that proceeding could be mistaken for precious metals, in the absence of a clear disclosure to the contrary, because of the appearance of the bezels.

The record here shows that respondents' bezels, even though containing some gold, were in fact composed of base metal with a thin and unsubstantial coating of gold. The test results disclose that the gold coatings were extremely thin. We note that under the Commission's Trade Practice Rules for the Watch Case Industry a coating of less than 1½/1000 of an inch thickness of precious metal is deemed either base metal or base metal flashed or coated with a very thin and unsubstantial coating. 16 C. F. R. 174.2 (9). A bezel with less than 1½/1000 of an inch thickness of gold marked in a manner set forth in such rule would not be considered misleading. Watches improperly marked as to gold content may be found to be deceptive and in violation of the Federal Trade Commission Act. Respondents do not dispute the reasonableness of the rule referred to. In fact, they assert in their reply brief that "... the record discloses that respondents, at the present time, mark all the watch cases they manufacture strictly in accordance with the regulations of the Commission."

We find and conclude that the gold appearance of respondents' bezels and the failure of respondents to prop-

erly mark them as a base metal or as base metal with a thin and unsubstantial gold coating has the tendency and capacity to mislead and deceive the purchasing public as to the metal content of such bezels. We also find and conclude that respondents, by their failure to properly mark their bezels, have provided their customers with a means of deception.

Counsel supporting the complaint has asked that individual respondent Robert Weil be held in default as to all the charges because of a failure to file a timely answer. The hearing examiner on April 3, 1961, entered an order holding this respondent in default, but further ordered that a hearing be held to determine the form of the "default order" to be entered. Subsequently, on April 13, 1961, respondent Weil filed an answer. The hearing examiner, in view of the answer, stated in his initial decision that no "default judgment" may be entered. He included respondent Weil in the order for the practices which he found to be unlawful. Since respondent Weil, along with other respondents, is found to be in violation of the law as to practically all of the allegations in the complaint, making the question nearly moot, we do not believe that further consideration of the issue is warranted. The contention of complaint counsel is rejected.

Respondents in their exceptions claim there is no evidence that Norman Slater, Martin J. Rasnow and Leo Hyman formulated, directed or controlled the acts and practices here involved. Such responsibility was expressly denied as to the three men in respondents' answer. The hearing examiner, while he made no finding as to the individual responsibility of these respondents, includes them in the order in their individual as well as their official capacities. Counsel supporting the complaint claim that the hearing examiner inadvertently omitted these names in his finding on individual liability and further asserts

that the hearing examiner must have been satisfied that policy was jointly determined by the officers. Complaint counsel, however, gives no record support for this view and in fact suggests that the Commission should "either support the order in the initial decision in this respect, or hold the particular individuals as officers of respondent Benrus Watch Company." Moreover, the evidence fails to show that such officers were individually responsible for the violations. In the circumstances, the complaint will be dismissed as to the aforementioned persons in their individual capacities.

The exceptions of complaint counsel are sustained to the extent above indicated and otherwise rejected. Respondents' exceptions likewise are sustained to the extent above indicated and otherwise rejected. It is ordered that the initial decision be modified in accordance with the views expressed in this opinion and that as modified adopted as the decision of the Commission. An appropriate order will be entered.

Commissioner Elman concurs in the result.

July 31, 1963.

APPENDIX D

(STATUTE INVOLVED)

Section 5(a)(1) of the Federal Trade Commission Act, 38 Stat. 719, 52 Stat. 111, 15 U. S. C. 45, provides, as follows:

> "Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are hereby declared unlawful."